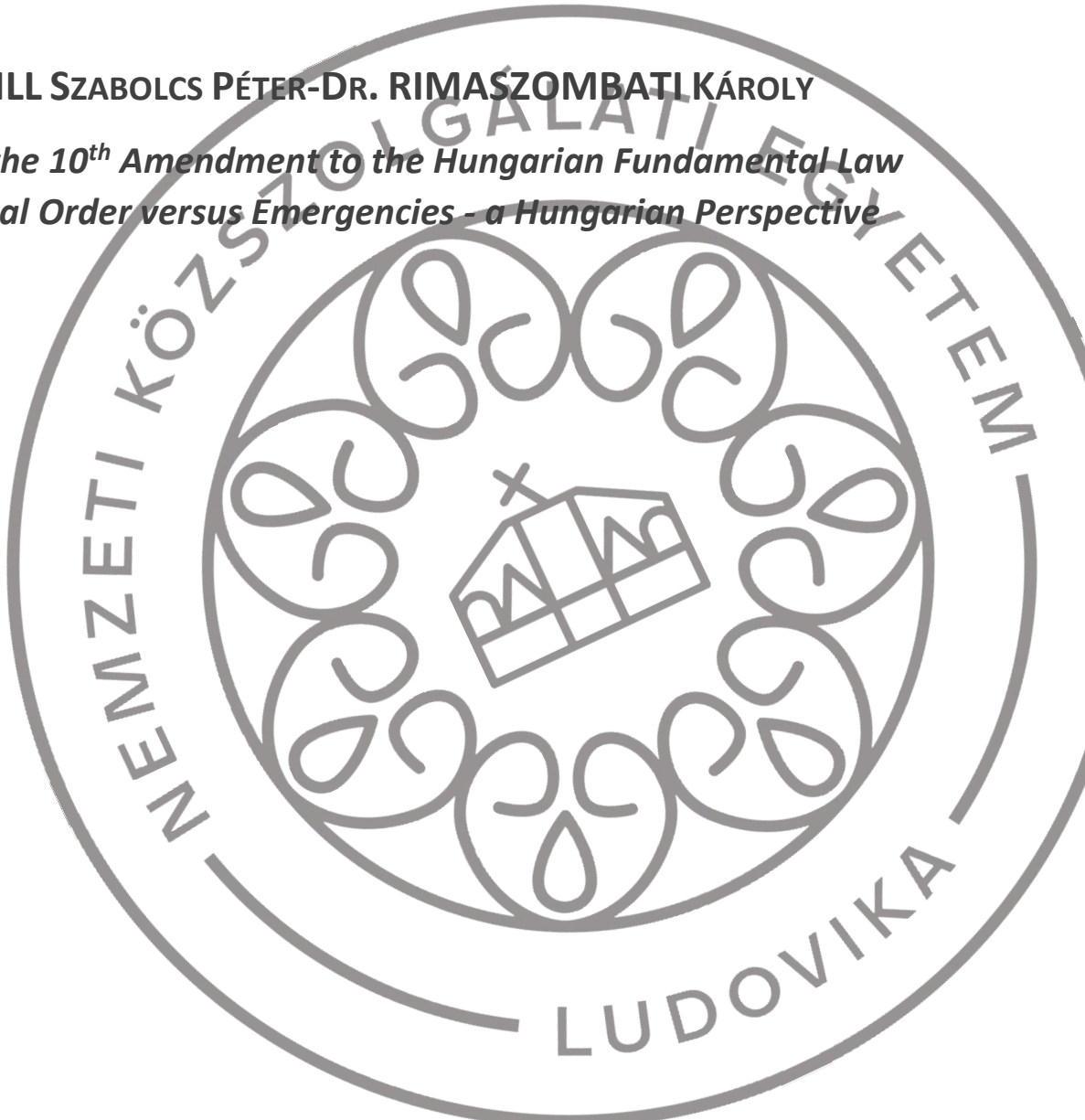
NEMZETI KÖZSZOLGÁLATI EGYETEM
VÉDELMI-BIZTONSÁGI SZABÁLYOZÁSI ÉS KORMÁNYZÁSTANI KUTATÓMŰHELY

VÉDELMI-BIZTONSÁGI SZABÁLYOZÁSI ÉS KORMÁNYZÁSTANI MŰHELYTANULMÁNYOK

2023/8.

DR. TILL SZABOLCS PÉTER-DR. RIMASZOMBATI KÁROLY

The 9th and the 10th Amendment to the Hungarian Fundamental Law
Special Legal Order versus Emergencies - a Hungarian Perspective



Rólunk

A műhelytanulmány (working paper) műfaja lehetőséget biztosít arra, hogy a még vállaltan nem teljesen kész munkák szélesebb körben elérhetővé váljanak. Ezzel egyrészt gyorsabban juthatnak el a kutatási részeredmények a szakértői közönséghez, másrészt a közzététel a végleges tanulmány ismertségét is növelheti, végül a megjelenés egyfajta védettséget is jelent, és bizonyítékot, hogy a később publikálandó szövegben szereplő gondolatokat a working paper közzétételekor a szerző már megfogalmazta.

A Védelmi-biztonsági Szabályozási és Kormányzástani Műhelytanulmányok célja, hogy a Nemzeti Közszolgálati Egyetem Védelmi-biztonsági Szabályozási és Kormányzástani Kutatóműhely küldetéséhez kapcsolódó területek kutatási eredményeit a formális publikációt megelőzően biztosítsa, segítve a láthatóságot, a friss kutatási eredmények gyors közzétételét, megosztását és a tudományos vitát.

A beküldéssel a szerzők vállalják, hogy a mű megírásakor az akadémiai őszinteség szabályai és a tudományosság általánosan elfogadott mércéje szerint jártak el. A sorozatban való megjelenésnek nem feltétele a szakmai lektorálás.

A műfaji jellegből adódóan a leadott szövegekre vonatkozó terjedelmi korlát és egységes megjelenési forma nincs, a szerzőtől várjuk az absztraktot és a megjelentetni kívánt művet oldalszámozással, egységes hivatkozásokkal.

A szerző a beküldéssel hozzájárul, hogy a művét korlátlan ideig a sorozatban elérhetővé tegyük, továbbá vállalja, hogy a working paper alapján megírt végleges szöveg megjelenési helyéről a szerkesztőséget legkésőbb a megjelenéssel egy időben értesíti.

A kiadvány ötletét az MTA Jogtudományi Intézet Law Working Papers sorozatának sikeréből merítettük.

Védelmi-Biztonsági Szabályozási és Kormányzástani Műhelytanulmányok 2023/8

Szerző:
Dr. Till Szabolcs Péter-Dr. Rimaszombati Károly

Szerkesztő:
Dr. Kádár Pál PhD dandártábornok

Kiadja
Nemzeti Közszolgálati Egyetem
Védelmi-Biztonsági Szabályozási és Kormányzástani Kutatóműhely

Kiadó képviselője
Dr. Kádár Pál PhD dandártábornok

ISSN szám
2786-2283

A kézirat lezárva: 2023. október 15.

Elérhetőség:
Nemzeti Közszolgálati Egyetem
Védelmi-Biztonsági Szabályozási és Kormányzástani Kutatóműhely
1441 Budapest, Pf.: 60
Cím: 1083 Bp., Ludovika tér 2.
Központi szám: 36 (1) 432-9000

SZABOLCS PÉTER TILL–KÁROLY RIMASZOMBATI:

The 9th and the 10th Amendment to the Hungarian Fundamental Law Special Legal Order versus Emergencies - a Hungarian Perspective[1]

"At the end of 2020, with the ninth amendment of the Fundamental Law of Hungary, the National Assembly decided on the first step in a process of major changes that would fundamentally reform the system of rules for the defence and security of the Hungarian legal system. Apparently, all that has happened is that the system of special legal rules has been streamlined, the number of special legal cases has been reduced from six to three, and in some respects the executive branch will be given additional powers with effect from 1 July 2023. The reform is not limited to this, it is not an end in itself, it focuses on the organisation and administration of a state capable of maintaining the continued functioning of the state beyond the crisis-free period, by means of crisis management and, ultimately, special legislation under the regime of the special legal order; at the same time, it provides a more flexible operational framework for law enforcement agencies and the Hungarian Defence Forces in order to guarantee the security of the life and property of its citizens and the defence of the country."[2]

Almost one year ago, the 9th Amendment to the Hungarian Fundamental Law entered into force because of the 10th Amendment: more than half a year earlier than it was originally planned. It happened in the middle of different emergency situations: first it was caused by COVID-19 pandemic, later because of the Russia-Ukraine war directly near the Hungarian border. They were both real security challenges, but their effects and the possibility to modify the constitution at the time of an emergency is still debated.

The real challenge is that facts are mostly seen similarly or the same way, but the evaluation of the intentions and the stories behind is antagonistically different. There is not a real public debate concerning the expectations and explanations of both amendments. According to governmental interpretation the system had not had the means to provide adequate responses to the new security challenges, for that reason the relevant regulation had itself become an obstacle of effective management. On the other hand, considering a situation with bad and worse answers sometimes means using non-adequate tools, because failing to act is a characteristic of a useless government. Having a decision by the Constitutional Court of Hungary might be a proof of a governmental mistake, or – by correcting some details – the same case might form the basis of criticism on the Constitutional Court itself according to EU critics.

[1] This article is financed from the Project TKP2021-NVA-16 of National Research, Development and Innovation Fund

[2] PÁL KÁDÁR: A Short Overview of the Reform of the Hungarian Defence and Security Regulations, HADTUDOMÁNY 2022/1.https://doi.org/10.17047/HADTUD.2022.32.1.61 p 62

NATIONAL RESEARCH, DEVELOPMENT AND INNOVATION OFFICE HUNGARY
PROJECT FINANCED FROM THE NRDI FUND

As for the interpretation of the oppositional voices, it is allowed neither to implement the constitution applying an extended interpretation, nor to amend it in a time of crisis. According to that reading, there is not a real security challenge at all questioning Hungary's ability to manage, it is only a governmental technique of securitisation to extend the room to manoeuvre without functioning checks and balances. Limitations of the governmental options to avoid unnecessary restrictions are more important, than surviving a (hypothetical) situation. Everything related to emergencies or special legal order functions only as pseudo-rule of law: the real aim behind is only to gain more and indefinite power.[3]

In conclusion, a Hungarian perspective on the constitutional level regulations of a special topic, the states of emergency, or according to a more country-specific conceptualization, the special legal order (SLO) means actively participating in a partisan debate. There are neither public debates nor shared views: explanations of official intents are from bureaucratic experts of some state-supported institutions[4] mostly in Hungarian, on the other hand, academic supporters of the opposition and NGOs use English-language blogs[5] – without reflecting on the semi-official explanations and interpretation – to influence mostly international political organs already criticizing the Hungarian governing parties and their supermajority at parliamentary level resulting in possibility to amend the national constitution without political compromises.

The latest academic meeting was held in 2017 at Pázmány Péter Catholic University,[6] where both sides of the two different standpoints were represented simultaneously, and we had the possibility to discuss together new, not necessarily military-type, often hybrid international security challenges and the potential reactions from the state, even in circumstances of simultaneous challenges.

According to the sceptical reading the *Weimar-failure* was the key element,[7] while military experts had a focus much more on how to make an overcomplicated constitutional system

[3] "The threshold between exceptional and ordinary laws and measures is fading away, and the COVID-19 pandemic (and now also the war against Ukraine) has worsened the situation so much that democratic values no longer mean anything to Hungarian voters, as the recent parliamentary elections exemplified. It is also remarkable that the ‚COVID emergency' allowed Orbán to rule by decree, a habit he enjoys a lot. Although we can find examples of how the emergency measures leaked into the normal legal order and how the emergency became permanent in recent years (state of migration emergency, state of medical emergency, Enabling Acts, etc.), the government's use of emergency decrees made an already autocratic way of government even worse." Gábor MÉSZÁROS: Never-Ending Exception: The Ukraine War Perpetuates Hungary's Government by Decree, 10 Mai 2022 https://verfassungsblog.de/never-ending-exception/ DOI: 10.17176/20220510-182253-0.

[4] See 70 papers from Defense and Security Regulation and Governance Research Workshop (Védelmi-biztonsági Szabályozási és Kormányzástani Kutatóműhely) on pages:
https://hhk.uni-nke.hu/kutatas-es-tudomanyos-elet/kutatomuhelyek/vedelmi-biztonsagi-szabalyozasi-es-kormanyzastani-kutatomuhely/muhelytanulmanyok/2021,
https://hhk.uni-nke.hu/kutatas-es-tudomanyos-elet/kutatomuhelyek/vedelmi-biztonsagi-szabalyozasi-es-kormanyzastani-kutatomuhely/muhelytanulmanyok/2022 and
https://hhk.uni-nke.hu/kutatas-es-tudomanyos-elet/kutatomuhelyek/vedelmi-biztonsagi-szabalyozasi-es-kormanyzastani-kutatomuhely/muhelytanulmanyok/2023.

[5] A typical forum is https://verfassungsblog.de/ publishing criticism only.

[6] https://szakcikkadatbazis.hu/Iustum_Aequum_Salutare/2017/4

[7] Gábor MÉSZÁROS, Rethinking the Theory of State of Exception after the Coronavirus Pandemic? – The Case of Hungary; DOI: https://doi.org/10.18485/iup_rlr.2020.ch7

manageable that time. We started to collect and connect some parts of the puzzle, because we had a feeling that something wrong might happen which, however, needs to remain manageable at state level.

The governmental crisis-management capacity became challenged by COVID-pandemics very soon after.[8] COVID-19 became a practical test of many theoretical considerations: according to a generalized point of Venice Commission's Report[9] from 2020:

> *"…few, if any states, have felt that their existing emergency laws are adequate for the present emergency, and have chosen to create a new type of special emergency law, or have complemented their existing laws dealing with infectious diseases with additional powers."*[10]

Only a few years after the above-mentioned academic debate, our knowledge is much deeper and broader now, providing the topic with examples and different regulatory solutions for mass migration, terrorism, COVID-19 pandemic, cyber- and kinetic attacks, reaching the threshold of even a full-scale war. On the other hand, the initiated governmental and parliamentary solutions have been challenged at different levels and forums, namely before Constitutional Court, at different EU institutions or even before the European Court of Human Rights. Over the past 3 years, the theory and practice of emergency regulations have become a focus of the debates dedicated to Rule of Law theory.

Our way starting from a marginal segment of constitutional law has become part of the everyday reality, too. It had taken nine years for the Hungarian Constitutional Court to decide on the possible separation of emergency regulations from military-focused issues.[11] In contrast, only in 2021 the Court had almost sixty new emergency-related precedent-type cases, and they were able to close down more than forty different files starting and ranging from connected data-regulations to vaccinations and obstacles of different professions, from

[8] "At the moment, there are five readings of the activation of Article 53 of the FL. The first is the opinion of the Government, which claims that the declaration of the emergency is constitutional, and each measure has been necessary. The second claims that normal-times measures could have been adequate to manage the defense against COVID-19. The third argues that the Act – already in 2011 – unconstitutionally expanded the meaning of the FL; therefore, the Government declared the emergency without a constitutional ground – it is viewed as another sign of dictatorship. Along this train of thought, there is a fourth opinion. It also claims the unconstitutional expansion of the FL definition but acknowledges the necessity of the deviation from the too closed system of constitutional emergency regimes. At the same time, they call for respecting constitutional principles and the reconsideration of the regulatory depth of the constitutional emergency regime. Based on the actual threat of COVID-19 and the management of the crisis in the first four weeks, and the constitutional and statutory design of defense against human pandemics, I still think that the actions of the Hungarian government simply show the business-as-usual functioning of illiberal constitutionalism." Tímea DRINÓCZI, Hungarian Abuse of Constitutional Emergency Regimes – Also in the Light of the COVID-19 Crisis, MTA Law Working Papers 2020/13. http://real.mtak.hu/121764/1/2020_13_Drinoczi.pdf p 19.

[9] CDL-AD(2020)014-e Report - Respect for democracy, human rights and the rule of law during states of emergency: reflections - taken note of by the Venice Commission on 19 June 2020 by a written procedure replacing the 123rd plenary session (Report) https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)014-e and CDL-PI(2020)003-e Compilation of Venice Commission Opinions and Reports on States of Emergency https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)003-e

[10] Report p 8.

[11] 102/E/1998. CC decision (11.06.2007.) http://public.mkab.hu/dev/dontesek.nsf/0/1D12A908CF0D134BC1257ADA00525FFB?OpenDocument

mandatory mask-regulations to banning of public demonstrations.[12] Many examples, challenges, practical considerations. Our world has changed, and our topic has become highly politicized.

Currently, Hungary is at a crossroads again: the Ninth and Tenth Amendment to the Fundamental Law entered into force and started functioning from 1 November 2022, accompanied by several modified and brand-new acts and government decrees. We keep practising almost constantly the different restrictions of a *state of danger* first due to COVID-19 pandemic or later the effects of the nearby war with a hope not to reach the necessity of considering a *state of war*. From that perspective, even to reduce the number of possible special legal order situations from 6 to 3 has two different consequences, although with modified emphasis between both Amendments researched:

- the entry point towards SLO has changed at least twice, and
- the function of different special legal order options has been modified, causing a possible lobby-function between *state of danger* and *state of war*.

Our task is to summarize the fundamental changes of the Hungarian system, and to present relevant aspects of such a complex and politicized part of our new reality, we have chosen ten elements to focus, which are specific neuralgic points of current Hungarian public debates.

Point No. 1 Current trends:

As the title of the Hungarian chapter of the comparative book by *Mádl Institute*[13] shows, we tried to reduce the **extreme complexity** of the earlier constitutional chapter on SLO.

At the time of the regime change (or transition) in 1989-1990, the Hungarian Constitution contained only three categories of emergency circumstances: *state of national crisis*, *state of emergency* and *state of danger*. According to professor Lóránt Csink,[14] the constitutional system had originally focused on preventing a possibly ex-communist president gaining too much power. At that stage many elements of the decision-making process were dedicated to parliamentarians hoping to shape the decisions by consensus. The possibility, to practically have power of veto as opposition chose to obstruct a draft instead of trying to modify it, was out of scope.

New types of special legal order were added to the system every decade answering different challenges from abroad or questions arising from conscription. Consequently, three further options were created before 2022, namely *unexpected attack* (or according to 2020

[12] TILL Szabolcs: Különleges jogrend 2020-2023. Magyar Katonai Jogi és Hadijogi Társaság, Budapest, 2022. pp 63-94.

[13] Zoltán NAGY – Attila HORVÁTH: The (too?) complex regulation of emergency powers in Hungary; In Zoltán NAGY – Attila HORVÁTH (eds.) Emergency Powers in Central and Eastern Europe; From Martial Law to COVID-19; Ferenc Mádl Institute Of Comparative Law Central European Academic Publishing Budapest – Miskolc 2022; https://mfi.gov.hu/en/academic_com/emergency-powers-in-central-and-eastern-europe-from-martial-law-to-covid-19/ pp 149-187.

[14] Lóránt CSINK: State of Emergency and Human Rights – the Situation of Hungary 2020 Brief Overview on the Regulation and Case-Law https://www.ceeol.com/search/article-detail?id=1075481 p 30.

translation *unforeseen intrusion*) in 1993*, state of preventive defence* in 2004, and *state of terrorist threat* (or *emergency response to terrorism* according to 2020 version)[15] in 2016, all of them to manage different situations with proportional toolkits with the simultaneous aim of avoiding escalation. Underlying reasons behind were the Yugoslav Wars, necessary time for preparation regarding NATO tasks and the second wave of terrorism in Western Europe. At least one party of the opposition supported each Amendment that time, during all-parliamentarian-party negotiations. There was an aborted attempt regarding challenge by mass migration: the Fundamental Law of Hungary could not be amended in 2015. Sharing Professor Csink's conclusion, there were not any systemic changes between the diffuse regulations of the former Constitution regarding our topic and the SLO chapter of the Fundamental Law till the 9th Amendment.[16]

On the other hand, only *state of danger* was applied in practice before the 9th Amendment, accompanied with some **quasi-SLOs**,[17] because of the challenges of mass migration and pandemics, sometimes happening simultaneously. As from 1 November 2022 the regulation almost returned to the starting point with the **extended and renewed three categories** of *state of war, state of emergency* and *state of danger*. The first two alternatives may be declared by the supermajority of the Parliament, and the last one by the Government with the possibility to be extended by authorisation of a reduced supermajority (two thirds of parliamentarians participating in the ballot). Nonetheless, the length of the text of this chapter in the Fundamental Law became even longer than it earlier was.

According to the original purpose of the 9th Amendment, this procedure aimed to reduce the possible occurrence of an SLO and the necessity of its declaration, by expanding the toolkit of governmental crisis-management in peacetime mostly in the framework of *coordinated defence activities*, regulated by the *Act XCIII of 2021 on the Coordination of Defence and Security Activities* (Hungarian abbreviation of the Act: Vbö). The new concept had been originally planned for framing all the existing quasi-SLOs, although it succeeded only partly.

Subsequently to the elections in 2022, surrounded by some restrictions of the COVID-based *state of danger*, the new legislation (again with a supermajority of two thirds possessed by the governing coalition) extended the causes of a possible *state of danger* towards the (mostly economic) effects of a neighbouring war in the 10th Amendment, giving a specific and individual reaction again on a new challenge instead of managing it as a state of danger, applying the means already available. Obviously, even the same tool might be reasoned in a different way when measuring the possible effects of different security challenges.

Point No. 2 New type security challenges:

[15] CDL-REF(2021)046 European Commission For Democracy Through Law (Venice Commission), Hungary Fundamental Law (prior to the Ninth Amendment, adopted on 15 December 2020) https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2021)046-e p 39-40.
[16] CSINK p 30.
[17] Quasi-SLO means extended powers of government to manage conflict-situations measured against the usual expectations and limits of the Fundamental Law, outside the SLO chapter.

According to the legal concept of emergencies, introducing special legal order might be considered if some challenge is not manageable by means of the usual rules of the constitutional system. **Perception of challenges** comes first, then consideration of possible options with different means and then the application of available extended tools. The aim is to return to normality as soon as possible, measuring proportionality against the necessary restrictions. It is a **balancing game** at multi-level "battlefields".

Before evaluating the geopolitical specialities of Hungary, we should highlight some interpretations relating to the constitutional emergency circumstances:

- before the Amendments, both possible triggering reasons and the decision on declaring one of the SLOs were connected to some mandatory legal condition(s): even at the time of 9/11 the government might have been accused of not introducing a *state of national crisis although it would have been obligatory at least to propose it at the level of Parliament,*
- declaring a SLO does not mean the annulation of peacetime rules: it means only that some regulation based on decisions of the Parliament (acts) might be suspended temporarily or modified by governmental decrees, but the parts not mentioned remain in force, and the modified elements might be challenged before the Constitutional Court,
- rules regarding special legal order are shared between the Fundamental Law and some acts and the latter ones might be even modified by governmental decrees,
- the Fundamental Law may not be suspended in times of special legal order either, however, since acts might be modified according to normal procedure at emergency situations, too, even the Fundamental Law might be amended according to the regular procedure, although it is precluded from laws (as basic of them) according to Article T.

It is obvious that there is not any ban of amendments in the text of the Fundamental Law: without the possibility to modify it, the surrounding world could not be adapted to. Interpretation is considered first, but if it does not lead to a result, only amendment remains. A constitution is not the synonym of a suicide pact, but the frame of the operating methods of a state to help grant the rights of people must sometimes be measured against other rights or obligations.

Although the so-called "new security challenges" are not so new, they had already been predicted and evaluated by NATO's Allied Command Transformation in the "Possible Futures Project"[18] and later in Strategic Foresight Analysis 2017 Report,[19] considering them as influencing Hungary's current geopolitical situation, on the Eastern and Southern Flank of both the EU and NATO, furthermore, Hungary – also having its own national interests – means a different perspective as compared with the obligate *rule of law* focus.

Restrictions might be considered in themselves or compared to the historical perspective only, or measured against the threat perceived, which inherently has subjective aspects.

[18] https://www.defencetalk.com/wp-content/uploads/2009/05/20090503_mfp_finalrep.pdf and http://www.bits.de/NRANEU/nato-strategy/20090503_MFP_annexes.pdf
[19] https://www.act.nato.int/wp-content/uploads/2023/05/171004_sfa_2017_report_hr-1.pdf

Methodology might be criticized or challenged, however, evaluating and analysing only the constitutional legal text without considering the contextual environment and challenges behind, must necessarily be a one-sided and biased explanation of the regulation.

On the other hand, the new Article 48 stipulates all the possible alternatives of special legal order: the connection between the three options and the quasi-SLOs might be argued because of similarities of ends and means, but they are two legally separated concepts. They should be measured against different constitutional scale: quasi-SLOs are limited by normal peacetime rules in Paragraph (3) of Article I, the toolkit of special legal order situations has an extended "necessity and proportionality" test in Paragraph (2) of Article 52.

Point No. 3 Different systems of legal categories:

There is **no unified or common international system of emergency-related constitutional categories**, only some similarities can be traced. The related human rights' agreements and their judicial review is much more about **limitation and examples of failed considerations** than about successful problem-solving, although, at least from a governmental perspective, the second would be the key question. The relevant human rights cases are **borderline questions connected to changing standards,** rather considering local political background much more than focusing on crisis-management.

Part of the problem is the **conceptualization** of reality with **translated or even misinterpreted texts and practices**. An evaluation conducted years after that the management or mismanagement had happened, based on different counter-factual *"would have been"*-type perceptions might occur.

Although emergency, as an umbrella-like piece of terminology might be misinterpreted referring to one of the former and current SLO options, notably the *state of emergency*, sometimes even the developing official translation of the Hungarian Fundamental Law is not used: *exigencies*[20] might be used instead of it pushing the concept towards quasi-SLOs,[21] or altered chronology was also used to support critical explanations.[22]

[20] Renáta UITZ, Hungary's attempt to manage threats of terror through a constitutional amendment, 28 April 2016 http://constitutionnet.org/news/hungarys-attempt-manage-threats-terror-through-constitutional-amendment

[21] " The essential element of the first period was that the new Fundamental Law created a sui generis state of emergency chapter, called 'Special Legal Order' (…). In contrast to the compact regulations, it became evident by 2020 that the government favours the use of so-called emergency measures outside the emergency provisions of the Fundamental Law." Gábor MÉSZÁROS, The Role of Emergency Politics in Autocratic Transition in Hungary https://www.academia.edu/44833126/The_Role_of_Emergency_Politics_in_Autocratic_Transition_in_Hungary

[22] "This chapter was the result of a countrywide campaign against mass migration in 2015, a series of events resulting in an amendment of the Fundamental Law. The new chapter aimed to fulfil the requirements of the constitution to protect citizens and democratic institutions especially in situations that threaten the lives of people and the security of the state. Meanwhile, the ultimate goal of the special law was to guarantee the return to ordinary law and order. In order to fulfil this aim, the Fundamental Law has opted to regulate these issues in a very detailed manner." Gábor MÉSZÁROS, Rule Without Law in Hungary: The Decade of Abusive Permanent State of Exception, MWP 2022/01 Max Weber Programme

It is typical to mention always some possible and expected side-effects explained by governmental intentions and if blaming turns out to be unjust, changing for another complain, or using only co-authors' academic papers to prove some used keywords as typical and negative terminology. At the time of COVID-19, in the critical papers the expression of *"Ermächtigungsgesetz"* or "Enabling Act"[23] was used to frame the meaning of the relation between government and Parliament. Although it could have been an option at the early phase of the pandemic, closure of Parliament had not happened, so critics turned to comment the limited importance of acts instead of apologizing because of the too pessimistic, however failed expectations.

It seems, that the reason behind the criticism is the factual supermajority of the governing parties for most of the period between 2010 and 2023, and since 2020 covering the whole researched time. Having a coalition with more than two thirds of the parliamentarian seats means possible authorisation to amend the Fundamental Law and the critics from opposition's side practically have only a communicative function. Having no voice results in turning from "responsibility to protect" to shaming without responsibility.

Point No. 4 Modified roles of the relevant actors:

Who makes the decisions and how, who might hinder which decision, and how it is possible to correct the mistakes? What is the role of **political and legal checks and balances**, and how are the legal possibilities used or misused? The core of the dilemmas is **efficiency versus inclusiveness**.

A new system should draw a line between roles belonging to **the decision side or the corrections side**. It is obvious, that the new system is timelier and **more effective**, even more transparent than the overcomplicated earlier regulation. Whether co-decision makers and corrective powers are **effective and efficient** enough, seems to have been debated for a long time, illustrated well by precedents of the Constitutional Court. The intent of the 9th Amendment was to balance governmental efficiency with broader judicial review.

Based on criticism of the COVID-emergency, the Amendment added some new requirements obliging the government to secure the continuous operation of the National Assembly and the Constitutional Court. Instead of the only negative expectation of earlier Article 54 paragraph (2), not to restrict the operation of the Constitutional Court, the new texts of Article 52

https://cadmus.eui.eu/handle/1814/73746 p 5-6. (Highlighting added). The chapter itself originated from 2011, and it was extended by the 6th Amendment of July 1 2016 regarding emergency response to terrorism only.

[23] "Based on Article 53 of the Fundamental Law which provided for a "state of danger," Enabling Act I gave lip service to the textual guarantees that Parliament and Constitutional Court would remain open and that most constitutional rights could not be infringed, and it required all decrees issued during a state of emergency to automatically sunset after 15 days unless renewed by the Parliament." Gábor HALMAI Gábor MÉSZÁROS Kim Lane SCHEPPELE How Hungary's Second Pandemic Emergency will Further Destroy the Rule of Law https://verfassungsblog.de/from-emergency-to-disaster/ 30 Mai 2020 HALMAI, Gábor, MÉSZÁROS, Gábor; SCHEPPELE, Kim Lane: From Emergency to Disaster: How Hungary's Second Pandemic Emergency will Further Destroy the Rule of Law, VerfBlog, 2020/5/30, https://verfassungsblog.de/fromemergency-to-disaster/ , DOI: 10.17176/20200531-013514-0.

paragraphs (3) and (4) also of Article 54 paragraphs (5) and (7) means a positive obligation to support the operation of the two constitutional organs practising political and legal control.

A key element of the criticism is the abolition of the National Defence Council (former Article 49),[24] a hypothetical centre of wartime power.[25] That institution has not ever worked at any time, was not even convoked. Hypothetically, it should have been able to make decisions with at least two different heads, with a size of 20-30 persons, with a definite majority of the government, however, without procedural rules and dedicated staff. Theoretically, it could have been regarded as a highly inclusive organ, but with the size specified, its operability was already questionable, furthermore, this solution was an antithesis of the separation of power, mixing elements of two and a half different branches of power.

The aim of special legal order regulation is supposed to be able to solve the emerging problems as quickly as possible to avoid losses because of the unexpected level of challenges. Timely decision-making is the key, the ability to react. Making bad decisions or mistakes is inevitable side effects of the system, but until these negative effects would not reach the level of the losses caused by the original challenge, the ability of the state to react in time is more important than power limitations on their own.

Resilience is another key: until the decision-making capacity of a state is intact, it can choose between the available options, although the decisions might be sub-optimal because of missing information, missing tools, or biases and mistakes in the procedure. At the end of the day, this system has added value compared to accidental survival: community might be organized to solve the acute problems and efforts might be focused to limit harmful consequences. Timely reaction is typical neither for ordinary legislation nor for too big organisations in general. The system of checks and balances is much more about opportunities to correct mistakes instead of impeding decisions.

Point No. 5 Aims of special legal order as a legal toolbox:

We strongly believe that the system of SLO is not a panacea, it is much more **an optional toolbox to solve the actual security challenges** and repair their effects in a bit extended way. On the other hand, although it is **supposed to de-escalate** the situation, it might boost the

[24] Former Article 49 (1) of the Fundamental Law: "The President of the National Defence Council shall be the President of the Republic, and its members shall be the Speaker of the National Assembly, the leaders of parliamentary groups, the Prime Minister, the ministers and – in a consultative capacity – the Chief of the Defence Staff."

[25] "78. A last substantive change is that the current constitution requires the creation of a National Defence Council to exercise substantial powers when in a national crisis, but the Ninth Amendment does away with the National Defence Council in all circumstances and vests its powers in the Government. (…) While these amendments do not seem, as such, incompatible with the Rule of Law or basic principles and standards of constitutional democracies, the concentration of emergency powers in the hands of the executive cannot be considered an encouraging sign, notably in the absence of any clarification in the explanatory memorandum for the ratio or the necessity of such modification." CDL-AD(2021)029-e - Opinion on the constitutional amendments adopted by the Hungarian Parliament in December 2020, adopted by the Venice Commission at its 127th Plenary Session (Venice and online, 2-3 July 2021) https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)029-e, p 19.

challenges **towards different types of challenges, or broader magnitude**. Two mistakes might appear at the phase of decision:

- the first is not to introduce special legal order when it is needed, and
- the second is to overreact the situation.

Typical political questions, without shortcut answers.

It would be ideal to live according to the theory of "end of history" without any security challenges. *"May there be peace, freedom and accord*", as the last phrase of the Fundamental Law of Hungary says. The 9th and 10th Amendments have not changed the context of the original wish for a better future. On the other hand, if the European Union and NATO should consider the security challenges based on subsidiarity, this task remains at state level at least as urgent as at international organisational level.

There are inherent limitations of the options regulated by international agreements, practice of international jurisdiction and some other institutions. It might have been an original mistake not to mention neither in the earlier Hungarian Constitution nor the Fundamental Law the possibility of a potential pandemic. It is not an excuse either that neither Article 15 of the European Convention on Human Rights mentioning *"war or other public emergency"* nor the UN conventions on Human Rights are focused on the possibility of pandemics, although the Spanish flu was a historic example closely connected and partly caused by the end of WWI. The difference is that the wording of the international agreements might be easily interpreted in a way that they include the re-emerged medical challenge after a century, but the original text of the Fundamental Law was a bit more rigidly framed. As the original text of Article 53 Paragraph (1) was about "*event of a natural disaster or industrial accident endangering life and property, or in order to mitigate its consequences,"* inclusion of a pandemic became questionable.[26]

On the other hand, the cause behind the pandemics is still considered as an element of a natural disaster – industrial accident spectrum, searching for evidence of human contribution intentionally or by mistake. From a constitutional legal point of view, if there was not a possibility to declare a state of danger, all the extraordinary measures taken would have become invalid *ipso facto*. Neither critics nor the Constitutional Court have taken that view, although it should have been an automatic consequence.

One consequence remains, namely that the original Article 53 Paragraph (1) had an inherent mistake in the wording which should have been avoided while drafting the new Article 51 Paragraph (1) of the 9th Amendment, which latter was meant to be a less strict definition.[27] The 10th Amendment broadened the definition even further, although the consequences of the Russia-Ukraine war would have been easier manageable given the new text than with the original one. The extension was much more needed regarding the old Article 53 Paragraph (1) than the broader new Article 51 Paragraph (1).

[26] SZENTE Zoltán. (2020): A 2020. március 11-én kihirdetett veszélyhelyzet alkotmányossági problémái; Állam- és Jogtudomány, 61(3), http://real.mtak.hu/116033/ pp 115–139.

[27] "(1) In the event of a serious incident endangering life and property, in particular a natural disaster or industrial accident, and in order to eliminate the consequences thereof, the Government may declare a state of danger."

Because of the rigid structure of the original text, the 10th Amendment reduced the preparatory time of the defence and security context-based reform and extended the only SLO option which is declared by the government.

Point No. 6 Connection of special legal order situations and quasi-SLOs:

We have already mentioned that one possible option is to create different crisis-management tools without reaching the threshold of special legal order. Those tools would be directly meant for quasi-SLO situations, broadening the efficiency of ordinary peacetime restrictions according to a bit extended necessity. Only one step is missing from that solution: no special legal order is announced, but **stricter regulations might reach similar effects**.

Proclamation of an emergency regime might be considered even as a more symbolic part of the political consideration if it is not accompanied by derogation of rights according to Article 15 of the European Convention on Human Rights.[28] COVID-19 was managed in two ways: between the times with declared *state of danger* we also had a quasi-SLO period in 2020, terminated just before the discussion of the 9th Amendment. Neither any *state of danger,* because of COVID-19, nor quasi-SLO was announced as derogations although ten countries mostly from Eastern-Europe used that option.[29]

There are two consequences. Restrictive measures introduced in a state of danger, but **without derogations,** should fulfil the same international fundamental rights standard as a state of medical crisis as quasi-SLO. Both arguments might be challenged, and proportionality seems to be the key aspect, although regularly alternating between special legal order and quasi-SLO might be an adequate answer if the challenge has different up and down phases.

From national constitutional legal perspective, the key difference between special legal order and a quasi-SLO regime is that restrictions are measured against Article 52 Paragraph (2) of the Fundamental Law or against the peacetime requirement of Article I. Paragraph (3). These levels are different at least from the perspective of the possibility to suspend some of the rights (compared to restrict only) and to restrict them even beyond peacetime limits. We should also add to that comparison that some obligations, connected typically to military service are dedicated to specified SLO-related time limits and aims only.

Comparing both Amendments in general from the perspective of the differentiation of special legal order from quasi-SLOs: **the 9th one was one step towards quasi-SLOs, the 10th was about to extend the possibility to introduce a state of danger**.

[28] Factsheet – Derogation in time of emergency 1. "a State may take measures derogating from its obligations under the Convention only to the extent strictly required by the exigencies of the situation."
[29] https://www.coe.int/en/web/conventions/derogations-covid-19

Point No. 7 Limitations of special legal order, altered checks and balances:

An **SLO in force and lacking derogation** of rights at the same time means two different points of reference. Restrictions introduced in a *state of danger* but without derogation that was caused by COVID-19 or by effects of a neighbouring war **are measured against SLO standards of the Hungarian Fundamental Law but against peacetime standards of the European Convention on Human Rights**. Two **different standards** might cause opposing considerations about necessity and proportionality.

Might it cause valid criticism against the content of the Hungarian Constitutional Court's decisions? It should not. **Two different standards mean possibility of two valid considerations with opposite ends**. Necessity and proportionality are the highlights of both lines of argumentation, but an extended room for restrictions is missing from international legal consideration.

From national perspective, the concept of special legal order which covers the three remaining options is measured against constitutional subtitle Common Rules Relating to a Special Legal Order covering Articles 52 and 53. According to Paragraph (2) of Article 52*:*

> *"Under special legal order, the exercise of fundamental rights – other than those laid down in Article II and III, as well as in Paragraphs (2)-(6) of Article XXVIII – may be suspended, or restricted beyond the extent defined by Paragraph (3) of Article I."*

The original peacetime standard of restrictions is sternly limited according to Paragraph (3) of Article I of the Fundamental Law, since

> *"[t]he rules relating to fundamental rights and obligations shall be laid down in an act of Parliament. A fundamental right may only be restricted in order to enforce another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary and proportionate to the objective pursued, and with respect to the essential content of the relevant fundamental right."*

Comparing the quotations at the time of special legal order:

- decrees by the Government are used instead of acts by Parliament,
- suspension of rights might be considered instead of (extended) restrictions only,
- the "essential content of the relevant fundamental right" is not immune from possible restrictions, and
- the aim of restriction is covered by the fact of declaration of special legal order.

From the perspective of the executive power these are the four possible aspects to restrict deeper even the most important fundamental rights. Excluded rights from possible limitations are:

- human dignity and right to life,
- ban of torture, inhumane or degrading treatment or punishment, human trafficking, or servitude, and
- some related rights extended towards limitation of science regarding human body and soul, lastly
- the basic limitations of criminal law and procedure according to the Post-Nurenberg Standards.

Comparing the list with Article 15 of the European Convention on Human Rights (with exclusions from possible derogations in time of emergency consisting of right to life, prohibition of torture, prohibition of slavery or servitude and the concept of no punishment without law) the Hungarian list seems to be even broader without considering the precedents of the European Court of Human Rights. The abolition of the death penalty from Protocols No. 6 and 13, as well as the right not to be tried or punished twice from Protocol No. 7 are also covered by Fundamental Law of Hungary.

From that perspective, limitations made possible by the Hungarian Fundamental Law are comparable with the texts of the international agreement, although precedents from the European Court of Human Rights might be considered, but not necessarily followed in the reasoning of the Constitutional Court of Hungary. All judiciary instruments should consider the ways of reasoning of the complaints differently, and even preconditions might be restricted in a different way.

For that reason, even the percentage of successful complaints is not a real index, neither expectation related to the length of procedure.[30] The Hungarian Constitutional Court was able to consider different legal concepts and threads of argumentation urgently, almost real-time. Their dogmatical outcome should influence the future regulation and practice of different emergencies also.

Expectations by some NGO-s regarding limits of emergency regulation-based complains[31] have neither considered the importance of some key decisions nor the composition of the Constitutional Court: even fact-checking in 3 days might become a challenge and it is much more of a bureaucratic working method instead of measuring legal concepts against each other, sometimes used first ever.

This hypothetical 3-day standard is even a reason behind the separation of decision-making and control roles: procedural limitation of legal considerations means reduction of the complexity towards pro or against governmental attitude-like communication, which is much more of a political argument leading towards *lawfare*:[32] instead of the *ratio decidendi* of the

[30] TILL Szabolcs: Az alkotmánybíráskodás és a különleges jogrend; Katonai Jogi és Hadijog Szemle 2022/3. pp 5-63. https://epa.oszk.hu/02500/02511/00022/pdf/EPA02511_katonai_jogi_szemle_2022_3_005-063.pdf

[31] "Prescribe that the Constitutional Court shall review emergency decrees brought before it within a short and fixed deadline, to ensure timely constitutional review. The possibility of actio popularis constitutional review requests should be re-introduced for emergency decrees." Selected recommendations for Hungary in the Article 7(1) TEU procedure May 2023P6-7 Hungarian Helsinki Committee | www.helsinki.hu (Chapters 1., 3., 4., 9., 12. and 13.) https://helsinki.hu/en/wp-content/uploads/sites/2/2023/05/HU_Article7_CSO_recs_May2023.pdf "While Hungarian NGOs urged the government to establish strict deadlines for constitutional review procedures in order to ensure the effective supervision of emergency legislation, the government failed to react and the Constitutional Court decided on several complaints only when the state of danger was already terminated, which resulted in a series of inadmissibility decisions. (…) This means that there is no effective control on the emergency government, neither Parliament (with the Fidesz-KDNP two-thirds majority in it) nor the Constitutional Court can guarantee to restore normalcy and rule of law." MÉSZÁROS, Rule Without Law in Hungary: The Decade of Abusive Permanent State of Exception p 11.

[32] "Outdated, inconsistent, and inadequately enforced regulations may:
a) weaken the state's ability to adequately respond to newer and more complex threats and crises or even lead to the lack of such ability,

case, the evaluation of the scorecard is the real focus of communication: at the end of the day the aim behind is not the correction of mistakes at considerations but de-legitimization of the executive branch.

Point No. 8 Necessary and proportional restriction of individual rights:

After failing to list all the potentially needed restrictions in the constitution, **tests of necessity and proportionality became the central categories of new Hungarian SLO approach**. According to *Pál Kádár*, head of the governmental Defence Administration Office,

> *"[i]n the practical application of the rules in force today, the **measures listed in detail have proven to be too rigid** in a number of cases, they fail to meet all potential challenges and, in some cases, **fail to specify** exactly what may be required."*[33]

Focusing on the new system he added that:

> *"[t]he only limitation is the principle that measures must be necessary and proportionate and, if the desired objective is achieved by a **less severe restriction**, that solution must be used. **Graduality** here is therefore ensured by the declaration of principles, **not by the prioritisation of measures**."*[34]

Consideration of alternatives is the key point of the new approach: instead of selecting one option from a closed list (*taxation*), all restrictions are theoretically available, but the chosen option might be questioned both politically and legally based on concepts of necessity and proportionality. Being personally involved might be a relevant circumstance because restriction of human rights in general is a negative term which might be *sui generis* aim or a selected device.

A typical comment on that approach is about vague concepts:[35] different possible consideration of the same issue regarding the circumstances with different ends is a negative result. On the other hand: if resilience[36] is a legitimate aim, and "ensuring the continuity of

---

b) make the state's responses to various contingencies unpredictable or at least uncertain,
c) and ultimately provide for a reasonable possibility of abuse by the state or its institutions."
Ádám FARKAS: The Status and Role of Law and Regulation in the 21st-Century Hybrid Security Environment https://acta.sapientia.ro/en/series/legal-studies/publications-acta-legal/volume-11-no-2-2022/the-status-and-role-of-law-and-regulation-in-the-21st-century-hybrid-security-environment p 117.

[33] KÁDÁR p 66.

[34] KÁDÁR p 66.

[35] "It seems that the scope of the new provision has been greatly widened to include non-violent threats, therefore the bar for declaring such an emergency has been lowered. The most crucial element of this new 'state of emergency' is that it may be declared in the event of 'overthrowing' ('felforgatás') the constitutional order. But 'felforgatás' is a concept previously unknown in Hungarian law and it has no clear definition. Therefore, the constitutional amendment rewriting the rules on special legal orders gives the government broad, vaguely defined new powers with even fewer checks and balances to use." MÉSZÁROS, Rule Without Law in Hungary: The Decade of Abusive Permanent State of Exception p 10.

[36] According to point 7 of Section 5 from Vbö: "national resilience shall mean, in accordance with Article 3 of the North Atlantic Treaty, promulgated by Act I of 1999, the ability of the nation's population, economy and state to the efficient forecasting and prevention of external or internal efforts, attacks, natural or industrial disasters, epidemics that damage or threaten the public order and security, and the defence and national

state operation, governance and essential government services as defined in the Fundamental Law"[37] belongs to the core of the concept, the ability to consider the defence-related situation and the whole of available government options is a key element of sovereignty, where international organisations and institutions might have only a supporting role, partly because of subsidiarity, partly because of the limited aims of those institutions.

To sum up this point, instead of strict predictions, broader definitions and theoretical considerations have been incorporated, because – according to the Venice Commission on a French case from 2016 –*"…it is hard to predict and describe an emergency situation exactly; a **degree of vagueness in the definition would thus appear unavoidable**."*[38] We will see the practical effectiveness at regulatory and governmental side, and consequences from judicial review. Implementing this new approach seems to be challenging, although the security situation has not worsened because of the applied *state of danger* at least.

Point No. 9 Differentiation between theoretical toolbox and practical application:

Returning to the Venice Commission again, we should differentiate between **activation and application of emergency measures**:

> *"[a]ctivation only entails that certain emergency measures can in general be taken if the concrete situation so necessarily requires, and application, in turn, means that the measure is taken. The distinction is important because the principles of necessity and proportionality are specified differently in these two stages."*[39]

Although operating the new system might be a harder challenge from an administrative perspective, the combination of different principles is supposed to lead to a more balanced way of thinking about emergencies and the specific restrictions applied. Closer **to necessity, proportionality, and temporariness** with the aim of returning to normality.

From that perspective, the general aim of an extended toolbox of the executive branch is to de-escalate any security situation by the reduction of possible negative consequences. We should answer a follow-on consideration: the length of special legal order might be a rule of law issue in itself?

Temporariness belongs to the heart of the problem: a mandatory requirement is even regulated by the 9th Amendment, namely that *"[a] special legal order shall be terminated by the organ entitled to declare the special legal order if the conditions for its declaration no longer exist."*[40] Further limitations are connected to a majority of Parliament: they might

---

security interests of the state, as well as its stability, the minimisation of risks and, in the event of their occurrence, their management, and afterwards the reconstruction as soon and as efficiently as possible via the civil and military preparedness, by improving security consciousness, increasing preparedness and taking the necessary protective measures;".

[37] Point a) Paragraph (2) of Section 42 from Vbö.

[38] Report 7. quoted from OPINION ON THE DRAFT CONSTITUTIONAL LAW ON "PROTECTION OF THE NATION" OF FRANCE CDL-AD(2016)006 https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)006-e

[39] Report 8. Para 34.

[40] Paragraph (4) of Article 53, Fundamental Law of Hungary.

consider the extension of SLO-s beyond the constitutional limits missing only at a *state of war* which is pending on the factual and legal consideration of the armed attacks, danger of war and situations with equivalent impacts.

A *state of danger* and *state of emergency* have their constitutional time limits of thirty days with a possibility to be extended by the National Assembly. According to Section 82/A. of Vbö, a *state of danger* might be extended several times, always by 180 days, pending on the consideration of a two-third majority of parliamentarians participating at the vote. There is not a similar rule regarding *state of emergency* in Hungarian legal system. Although the regulations of paragraph (3) of Article 50 and paragraph (3) of Article 51 might share some similarities at reasoning, differentiation at Vbö-level means a more rigid time limit for *state of emergency*, which used to be more debated because of the possible reasons behind, after the 9th Amendment because of the possible options based on new subversion-part changing at wording from armed/violent acts to unlawful acts massively endangering life and property.[41]

Although broadening the context of *state of emergency* is justified by hybrid challenges, mostly cyber-attacks targeting critical infrastructure considered as real security concerns by NATO and EU both, because of the 10th Amendment possible connection between the timely less limited *state of danger* and *state of war* became even more relevant. A demarcation between *state of war* and *state of danger* depends on a consideration whether Hungary is targeted or only affected by the neighbouring war, which may cause a long period.

According to the former Act on Home Defence from 2011, possible governmental tools were limited as compared to the overlapping and open toolbox of Chapter XIII of Vbö for both SLO-options: even military preparation is included if it relates to causes of activation of *state of danger*. Although according to paragraph (3) of Article XXXI modified by the 9th Amendment, mandatory military service remains connected to a *state of war,* this is the only segment excluded from potential military preparation according to constitutional limitations.

Considering only restrictions without security circumstances means that based on politically considered open legal concepts, broad toolbox is available for the government, and even directly military-related governmental decrees were to be issued[42] after both Amendments researched.

---

[41] "The main problem with this new amendment is that it substantially broadens the range of situations in which the state of danger can be declared; it appears that it is up to the government to decide which situations or actions meet the description 'humanitarian catastrophe' in a neighbouring country. I agree that a humanitarian crisis could have a great impact on a neighbouring country, but it is hard to believe that a humanitarian problem in another country justifies emergency powers and nearly unlimited governmental power to rule by decree without parliamentary oversight." Mészáros, Gábor: Never-Ending Exception: The Ukraine War Perpetuates Hungary's Government by Decree, VerfBlog, 2022/5/10, https://verfassungsblog.de/never-ending-exception/

[42] Government Decree 448/2023. (X. 3.) on the Emergency Measures of Unmanned Aircraft Protection,
Government Decree 404/2023. (VIII. 30.) on Emergency Provisions Other than Act CXL from 2021 on Home Defense and the Hungarian Defence Forces Related to the Introduction of the National Defense Subject,
Government Decree 381/2023. (VIII. 10.) on the Different Application of the Regulations for National Defense and Military Structures during the State of Danger,
Government Decree 240/2023. (VI. 20.) on the Operating Procedures of the Hungarian Defense Forces during the State of Danger,

Point No. 10 Systematic evaluation of the new regulation:

We have to examine a key argument again, which was already mentioned as a critique regarding the 9th and 10th Amendments of the Hungarian Fundamental Law, and also shared by Venice Commission, notably that they **were decided and implemented in a time of *state of danger***, after a relatively **short parliamentary decision-making process** without inclusive public debate.[43]

We believe that our points successfully showed many considerations regarding the desired end state of this complex reform. Its elements might be challenged, but the overall status shows a more effective system, which is supposed to be able to manage different, even brand-new security challenges, as well. So, the criticism is much more about "How" and less about "What". The aim was confirmed even at international level: *"The Venice Commission welcomes this change, insofar as it simplifies and makes clearer when exceptional states apply, making the law more accessible and understandable."*[44] Also considering the structure of Vbö we are right to share considerations of General Kádár:

> *"At the end of the process, the goal is a state organisation that manages security not only at the level of declarations, but also in its regulations, administration, procedures and the professionalism of the public administration staff, ensuring a high level of public awareness of defence and security issues and the actual involvement of the members of the society."*[45]

We hope that the defence and security reform is not to fail, because according to Brigadier General Kádár: *"[a] 'failure' would have a direct adverse impact on the functioning of the country and the security of the population, which could, in extreme cases, lead to a direct violation of our sovereignty."*[46]

On the other hand, we will need some years of practice to be able to assess the added value of the new decision-making system from the perspective of an expected more modern, simpler, and more expedient governmental practice, because the emphases of both

Government Decree 8/2023. (I. 17.) on Certain Emergency Measures Regarding Act CCV of 2012 on the Legal Status of Hungarian Soldiers.

[43] "83. The Venice Commission notes with concern that the amendments were adopted during a state of emergency, without any public consultation, and the explanatory memorandum consists of only three pages. The Venice Commission considers that this swift procedure is not in line with its recommendations in the Rule of Law Checklist, nor is it compatible with the Commission's Report on Respect for democracy, human rights and the rule of law during states of emergency and the Report on the Role of the opposition in a democratic Parliament.

84. The Venice Commission stresses that this speed and the lack of meaningful public consultations are particularly worrisome when they concern constitutional amendments and it recalls its previous warning against an "instrumental attitude" of Hungary's governing majority towards the Fundamental Law, which should not be seen as a political instrument." CDL-AD(2021)029-e Opinion on the constitutional amendments adopted by the Hungarian Parliament in December 2020, p 20.

[44] CDL-AD(2021)029-e Opinion on the constitutional amendments adopted by the Hungarian parliament in December 2020, p 18.

[45] KÁDÁR p 64.

[46] KÁDÁR p 64.

researched Amendments are a bit different: although having expanded the meaning of some concepts, the focus of the 9th Amendment was much more on capacity-building of the state below the SLO-context. The 10th Amendment returned to an extended application of *state of danger*, the only SLO-option applied on decision by the executive branch.

It was not a decision by the Government only: later even the Constitutional Court of Hungary contributed to change the focus by reducing room for manoeuvre as they re-interpreted the limits of implementing governmental and ministerial decrees strictly:

> *"However, the Act allows derogations, even by way of a ministerial decree, from its own rules in the provisions at issue. In the view of the President of the Republic, the possibility of derogation by ministerial decree, which is a lower level of legislation than the Act, without any substantive framework, renders the statutory or partially cardinal legislation void and infringes the hierarchy of norms, thereby infringing legal certainty. In its decision, the Constitutional Court held that the law-maker had given a general authorisation in the Act to derogate from the rules of the Act. It is not possible to identify precisely which rules it would allow derogation from and under what conditions. Thus, the full scope and limits of the minister's powers are not sufficiently clear and cannot be accessed and calculated by the citizens. In the Constitutional Court's view, such an authorising provision creates a legislative possibility contrary to the Fundamental Law. The Constitutional Court therefore held that the contested provisions of the Act are in breach of the Fundamental Law and therefore the Act may not be promulgated."*[47]

Consequences regarding the SLO and quasi-SLO alternatives are significant, based on the binding interpretation of the Constitutional Court of Hungary: although the decision has not mentioned our topic at all, all the expectations mentioned about peacetime decrees affect limitations of quasi-SLO-s by excluding open-ended authorizations.

According to that conclusion only special legal order might remain as scope of free (or at least less rigidly limited) governmental decisions, where necessity, proportionality, and temporariness function as relative barriers of legal and political considerations, if the concept of emergencies itself is valid. Questioning legality and legitimacy of both Amendments researched means from this perspective challenging the core functions of the Hungarian constitutional system returning to the original debate regarding possibility to switch from Constitution to Fundamental Law without a consensus of all parliamentary parties as of 1 January 2012.[48]

[47] See 19/2023. (VIII. 7.) CC decision on Preliminary norm control aimed at the establishment of a conflict with the Fundamental Law and the annulment of the Act on the Regulation of Public Construction Investment Projects (Bill No. T/3677) adopted by Parliament on the sitting day of 4 July 2023 (hierarchy of sources of law) https://hunconcourt.hu/datasheet/?id=8F4A3E31FE02F941C12589EB00448214

[48] "In 1995, the constitution had been changed to require a four-fifths vote of the Parliament to set the rules for writing a new constitution. However, after the elections the two-thirds majority removed this provision with its first amendment of the constitution and the Fidesz Parliament was able to use its supermajority to write a new constitution on its own." Gábor MÉSZÁROS, The Role of Emergency Politics in Autocratic Transition in Hungary

It is not a coincidence, that although Explanatory Memorandum of the Ninth Amendment to the Fundamental Law[49] provided by Hungarian Authorities is short but it highlights some security challenges not manageable according to the old system of the chapter, which was already discussed earlier.[50] After some years of constantly used *state of danger* because of the reasons in question above, our conclusion is, that it is a much better situation being accused before international institutions than becoming victim of mass-scale terror, a coup, a revolution or a war.

Conclusion

Close to the first anniversary of being in effect, after a quarter of originally planned date of the reform we may extend Brigadier General Kádár's consideration on both Amendments, namely that *"…the Fundamental Law provision is only the first step in a comprehensive series of legislation and measures that will put the entire defence and security administration on a new footing."*[51] Not only amended or replaced acts, but considerations by the Constitutional Court, practice of Government and even criticism by domestic and foreign critics and institutions might contribute to the future of the regulatory regime.

On the other hand, not all expectations are fulfilled, because limitations below the threshold of SLO seem to be limited mostly by decision of the Constitutional Court mentioned at Point No. 10., so room for political decisions is focused on the introduction and maintenance of special legal order, particularly *state of danger*.

If the application of special legal order alternatives contributes to limit the security challenges instead of sharpening the situation, altered rule of law-concept remains a tool for stability. This outcome is more important than fulfilment of ideal-typical theoretical conditions. On the other hand, many tasks are still to fulfil the aims regarding professionalism and procedures of public administration, public awareness, and involvement of society in defence and security issues, paraphrasing words of Director General of the Defence Administration Office quoted earlier.

---

https://www.academia.edu/44833126/The_Role_of_Emergency_Politics_in_Autocratic_Transition_in_Hungary p 194.

[49] "The cases of declaring a state of war (the present state of national crisis) and a state of emergency would be expanded, taking into account the requirements of the changing security environment (for example, a cyberattack that does not constitute an act of violence or an attack in the form of environmental pollution), and the Parliament would still be the only one entitled to declare both."
https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)045-e p 8.

[50] See Szabolcs Péter TILL: Freedom of European National Constitutions to Regulate Emergencies (Comparative study on the Hungarian structure of special legal orders) https://hadijog.hu/wp-content/uploads/2023/01/Szabolcs-Peter-Till-Freedom-of-European-NAtional-Constitutions-to-regulate-emergency.pdf pp 54-63 and CDL-AD(2011)016 European Commission for Democracy Through Law (Venice Commission) Opinion on the New Constitution of Hungary Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011) on the basis of comments by Mr Christoph Grabenwarter (Member, Austria) Mr Wolfgang Hoffmann-Riem (Member, Germany) Ms Hanna Suchocka (Member, Poland) Mr Kaarlo Tuori (Member, Finland) Mr Jan Velaers (Member, Belgium)
https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)016-e pp 27-28.

[51] KÁDÁR p 61.